


# **ATTACHMENT 1**

# *In re Pork Antitrust Litigation* Class Certification Hearing

**Class Plaintiffs' Opening Argument**  
**January 31, 2023**

# The Law Supports Certification in Commodity Antitrust Cases

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- 
- “Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.”

*Amchem Prod., Inc. v. Windsor*,  
521 U.S. 591, 625 (1997)

- “Classes alleging horizontal price-fixing conspiracies will typically satisfy the predominance requirement because all of the customers that purchased the product from the defendants paid higher prices than they would have paid absent the anticompetitive acts and were therefore impacted in the same way.”

6 William B. Rubenstein, *Newberg on Class Actions* § 20:52 (5th ed. 2011)

# All Three Elements of Class Plaintiffs' Claims Will Be Shown with Class-Wide Proof

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**Fed. R. Civ. P. 23(b) provides:**

- (b) A class action may be maintained if Rule 23(a) is satisfied and if:
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members. . . .

\* \* \*

**The elements of the class plaintiffs' claims are:**

- (1) **Did Defendants conspire** to raise prices of pork products sold to class members?
- (2) **Did class members suffer an impact**, i.e., did class members pay higher prices for pork products because of Defendants' conspiracy?
- (3) **Can Plaintiffs reasonably estimate the damages** to class members resulting from Defendants' conspiracy?

# Common Class Wide Evidence of Conspiracy (Examples)

## April 2008: 21st Century Forum Meeting

- “Debate swirled around just how many sows need to leave North America in order to bring back profitability.”  
*Doc. 1324-3 Page 2 of 4, Ex. 10*
- Clemens conducted “**‘informal’ late night poll[s]**” to determine which of their competitors were **reducing supply** “through euthanasia, or the likes.”  
*Doc. 1324-3 Page 3 of 4, Ex. 10*

## June 2009: Smithfield Earnings Call

- Larry Pope (CEO): “I think we solidly need – that’s my prediction, that ***we solidly need a 10% cutback.*** I think that would make the industry very profitable and that’s probably ***the highest that anyone is talking about.***”  
*Doc. 1324-11 Page 12 of 21, Ex. 21*

## July 2009: Phil Clemens to Clemens Board

- “Remember, we believe the sow herd needs to come down by about 600,000 to bring hogs back to real profitability.”  
*Doc. 1324-18 Page 2 of 6, Ex. 28*

# July 2008 Smithfield Annual Report

“As production is reduced and costs rise, meat prices will increase.”

*Doc. 1324-7 Page 2 of 2, Ex. 16*

# James Lochner, Tyson COO

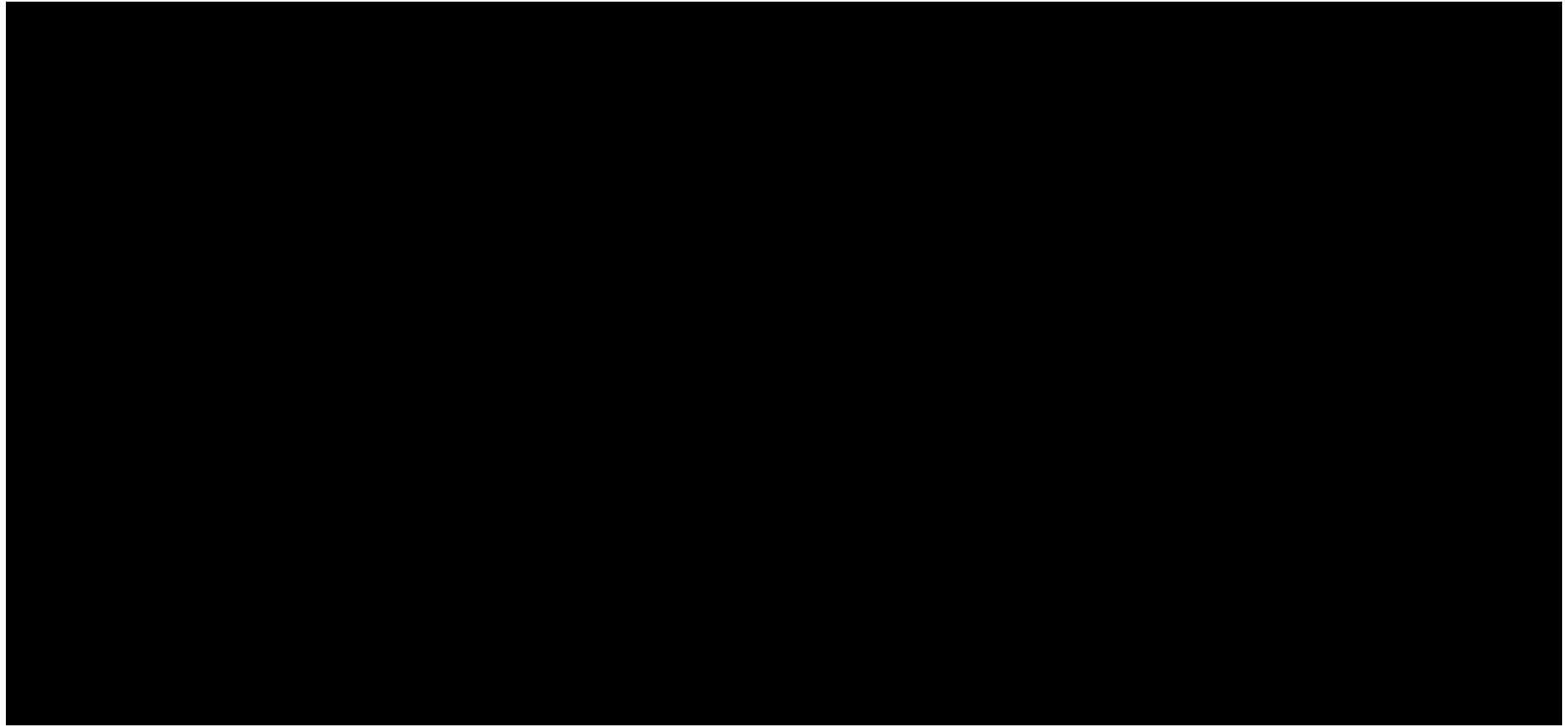


## August 2009 Earnings Call:

“Hog supplies will be down in Q4 year-over-year but still adequate. We do expect to see ***liquidation accelerate and Pork production decrease into 2010 and beyond to improve producer profitability***. We’ll continue to watch forward hog supplies, drive more exports, monitor demand, focus on cost, mix and pricing to generate revenue.”

Doc. 1324-20 Page 7 of 22, Ex. 30

# Paul Peil, Hormel Director of Fresh Meat Sales



*Doc. 1326-20 Page 2 of 3, Ex. 79*



# Larry Pope, Smithfield CEO



**Smithfield**

## September 2009 Earnings Call:

“Smithfield cannot solve this problem alone, unless we were to take everything out. We can’t solve the problem. But the answer to that is yes, **I have had conversations** with several sizable, more than sizable producers, large producers, in fact very large producers, and **I would tell you they are doing some liquidation.** But again, I don’t think they can solve it. I think **this industry has got to solve it collectively.**”

*Doc. 1324-22 Page 11 of 21, Ex. 33*

# Phil Clemens, Clemens CEO



**CLEMENS**  
FOOD GROUP

## **Clemens Speech from Fall 2009 21st Century Pork Club Meeting:**

Phil Clemens tells other producers that to address “over-production in our industry,” “[w]e must work together wherever and whenever possible. As an industry we must be willing to speak with one voice in a very compelling manner.”

*Doc. 1324-4 Page 25 of 27, Ex. 12*

# Defendants Coordinate Sow Liquidation

**Sept. 2008**

**Christensen Farms**, a member of Triumph Foods, reported it had cut back 11,000 sows

**Jul. 1, 2009**

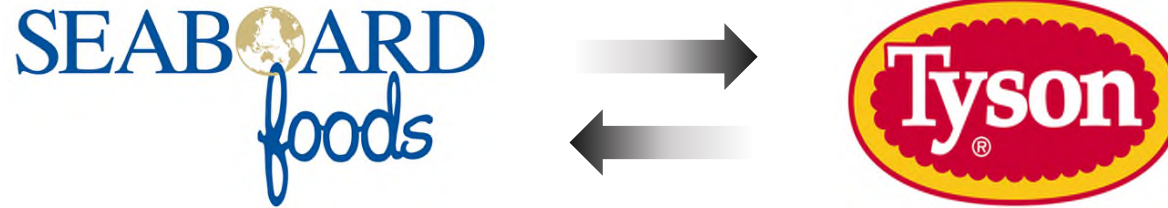
**Smithfield** announced that it plans to reduce its U.S. sow herd by 40,000 to 50,000 sows. This ultimately will result in production of 800,000 to 1 million fewer market hogs annually

**Jul. 15, 2009**

**Tyson** followed Smithfield's lead, announcing that it was reducing "its sow herd by 20,000 head over the next 10 weeks"

**2008**

**2009**



## Seaboard's Mel Davis to Tyson's Steve Thompson:

"With regards to the sow reduction at Tyson are you selling the sows to someone else who will continue to produce with those sows or are the sows being liquidated?"

## Tyson tells Seaboard:

"The sows are ***being liquidated*** and the sow units are ***being taken out of production.***"

## Seaboard's Davis reports to Seaboard CEO Terry Holton and others:

"Just checked with Tyson. The 20,000 sow reduction they have announced will result in 20,000 sows being liquidated."

# Exports to Reduce Domestic Supply



- **Tyson:** “the key will be export shipments in Q3/Q409 to create the disappearance to keep the industry profitable”

*Noel White 2009 Internal Email, 1324-10 Page 2 of 2, Ex. 20*



- **Hormel:** “Smithfield[‘s] goal [is] to continue to increase export volume. . . . They are all about increasing exports to tighten the domestic supply with the goal of elevating markets.”

*Paul Peil 2014 Email, Doc. 1326-22 Page 3 of 4, Ex. 81*



- **Smithfield:** “The fact is the more US pork that gets out of the country, the better for the values of the meat that remains in the United States”

*Ken Sullivan 2015 Earnings Call, Doc. 1324-2 Pages 17-18 of 33, Ex. 9*



- **Clemens:** “higher value export opportunities in Japan/Korea . . . will help take some of the pressure off of domestic sales with the volumes increasing so fast as well as provide some nice margins.”

*Rod Brenneman (Clemens Board Member; Former Seaboard Employee) 2018 Email to Clemens Executives, Doc. 1326-32 Page 2 of 2, Ex. 91*

# Larry Pope, Smithfield CEO



**Smithfield**

## Smithfield March 2011 Earnings Call:

CEO Larry Pope touted the “double-digit margins” the industry was experiencing in early 2011 following industry production cuts.

Pope also said:

- “we are not going to build a new plant to expand capacity,” and
- barriers to entry are so large that any outsider expansion or entry would not be able to happen for multiple years (due to the time and cost associated with building a new facility).

*Doc. 1330 Pages 47-48 of 190 (Mangum Report: TF-P-001193285–301 at 295)*

# Seaboard Had Lower Sales Volume but Higher Pork Prices

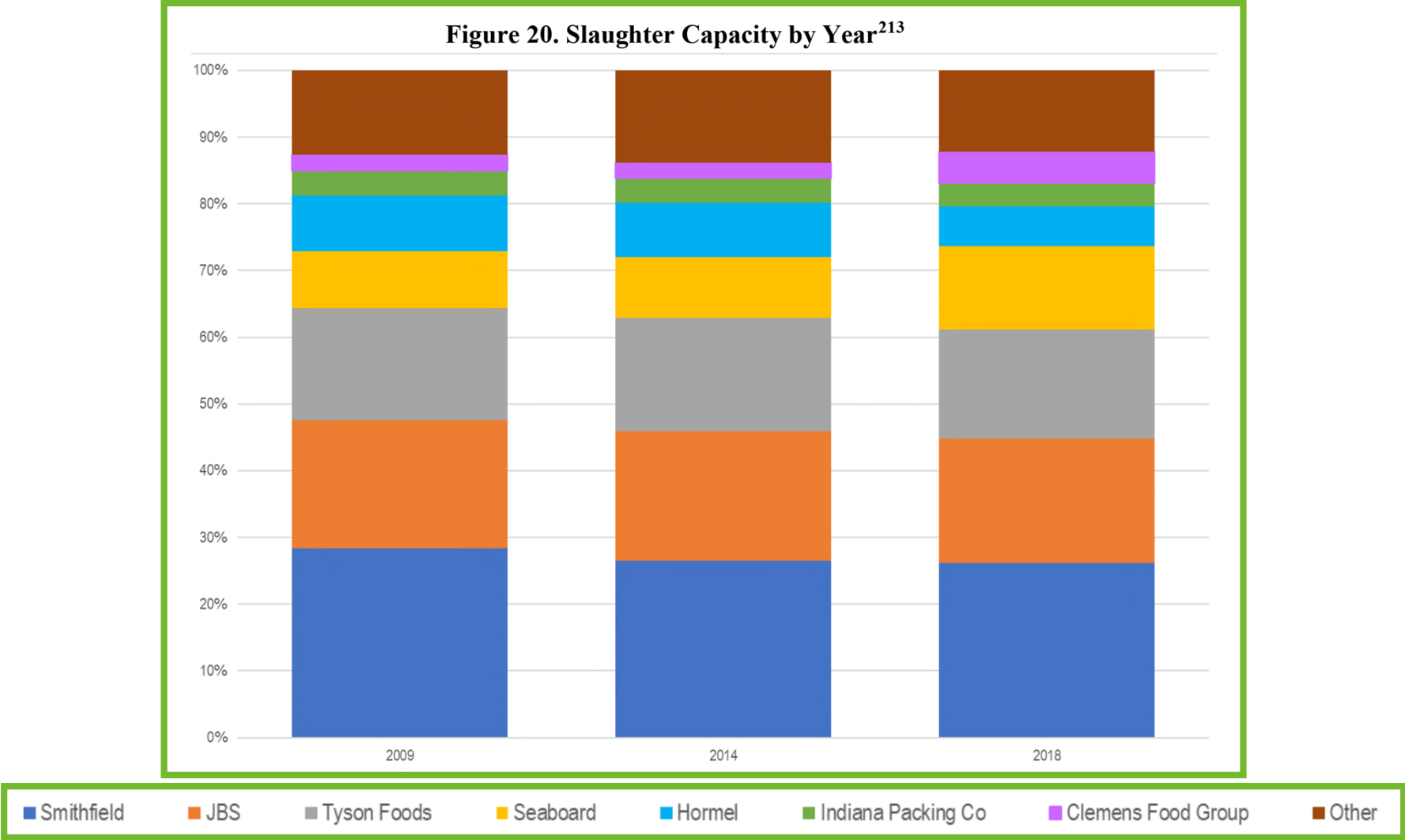
**Despite Having an Almost Identical Capacity As in 2012, Seaboard Reported in 2013 That It Had...**

***“lower sales volume*** of pork products in the domestic market” which resulted in ***“higher prices for pork products*** sold in the domestic market.”

*Doc. 431 Page 57 of 94, n. 50 (citing Seaboard 2013 Annual Report)  
<https://www.seaboardcorp.com/download/1992/?tmstv=1674846587>*

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# Defendants Dominated the Pork Market With Combined Market Shares Over 85%





# Pork Is a Commodity

- **Triumph:** “The wholesale pork market is first and foremost a commodity market, defined as a market where the products of all sellers are very similar, and price will tend to fluctuate depending on available supplies and level of interest (demand).”

*Doc. 1330 Page 71 of 190 (Mangum Report: TRI0000049789–827 at 799)*

- **Clemens’ Dan Groff:** Defendants commonly buy and sell pork to each other, because it is a “commoditized business.”

*Doc. 1330 Page 71 of 190 (Mangum Report: Daniel Groff Dep. 38:3-13)*

- **Smithfield’s Robert Moore:** he would not be able to tell which company had made pork products by looking at them without their packaging, because “bacon is bacon.”

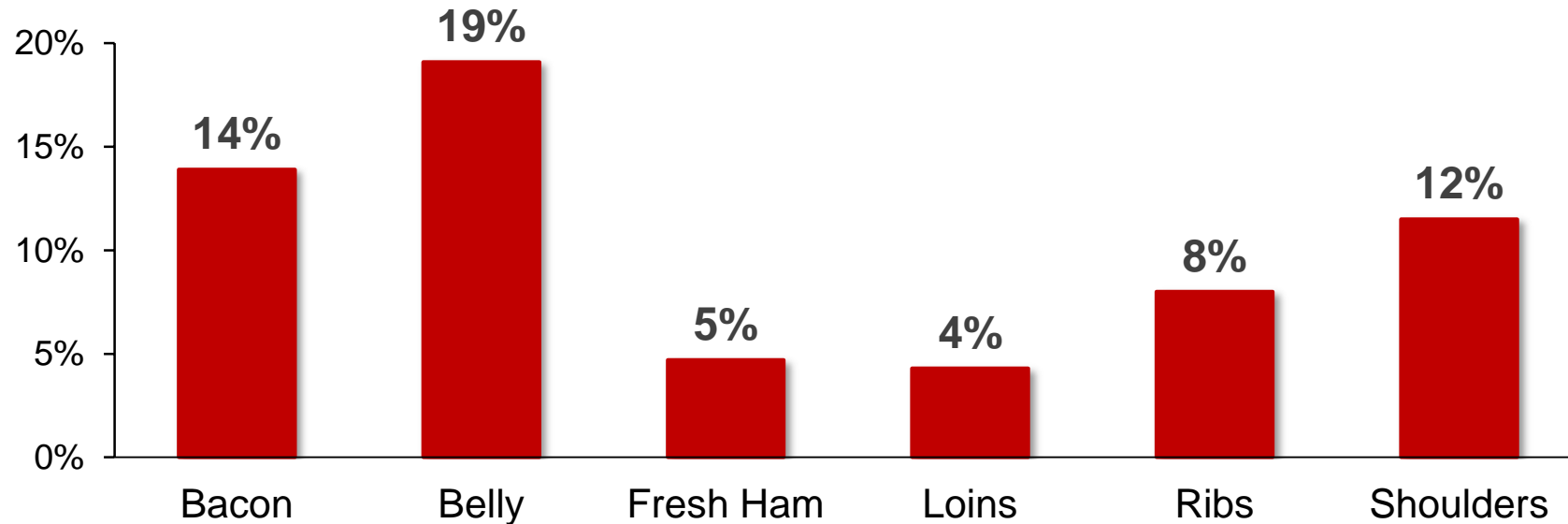
*Doc. 1330 Page 71 of 190 (Mangum Report: Robert Moore Dep. 20:24-21:07)*

- **Hormel’s Paul Peil:** consumers would not be able to tell the difference between different packers’ pork products without labeling.

*Doc. 1330 Page 72 of 190 (Mangum Report: Paul Peil Dep. 181:3-182:15)*

# Damages

Using regression analysis, Dr. Mangum calculated the amount by which Class members during the Class Period were overcharged:



- Dr. Mangum estimated the relevant Class commerce to be \$51,378,285,595 and Class-wide damages during the Class Period to be just over \$5 billion.

*Doc. 1330 Page 12 of 190 (Mangum Report)*

# Defendants' Cuts, Exports, Communications, and Other Conduct Went Well Beyond Legitimate Market Dynamics

If the production cuts during this period were the inevitable outcome of a normal, recurring trend of supply expansion and contraction, and if—as Defendants' experts insist—hog growers acted independently without influence from processors, it is unclear why industry leaders would need to issue such warnings and calls to action. That is, **no industry “discipline” is needed when the desired action (lower supply) will already naturally flow from market conditions.**

*Doc. 1617 Page 44-45 of 128 (Mangum Reply Report)*